IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

**ON A PETITION FOR A WRIT OF PROHIBITION
FROM AN ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY
CIVIL ACTION NO. 11-MISC-206**

**STATE OF WEST VIRGINIA, ex rel.
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL,**

Petitioner,

v. **Prohibition No. 11-1644**

THE HONORABLE CHARLES E. KING, JR., JUDGE, Circuit Court of Kanawha County; FAST AUTO LOANS, INC., a Virginia Corporation; COMMUNITY LOANS OF AMERICA, INC., a Georgia Corporation; and ROBERT I. REICH, President and Chief Executive Officer of Fast Auto Loans, Inc. and Community Loans of America, Inc.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

After disregarding his appeal deadline, and without any citation to Judge King's Memorandum Opinion & Order ("Order"), Petitioner has presented the following five "questions" for determination by this Court, none of which arise from the specific ruling below:

1. Whether a Virginia lender who makes loans to West Virginia residents secured by titles to their motor vehicles that engages in "debt collection" practices that allegedly violate the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-1-1, et seq., (i.e., harassing consumers by telephone, disclosing debts to family members, friends, references, employers; contacting third parties) has engaged in sufficient minimum contacts for due process purposes to submit itself to the investigative and regulatory jurisdiction of the Attorney General of West Virginia?

2. Whether a Virginia lender that files liens with the West Virginia Division of Motor Vehicles against the titles of vehicles owned by West Virginia residents to secure its loans has engaged in sufficient minimum contacts for due process purposes such as to submit itself to the investigative and regulatory jurisdiction of the Attorney General of West Virginia?

3. Whether a Virginia lender that makes loans to West Virginia residents secured by titles to their motor vehicles who physically enters West Virginia to seize motor vehicles when consumers default has engaged in sufficient minimum contacts for due process purposes to submit itself to the investigative and regulatory jurisdiction of the Attorney General of West Virginia.

4. Whether the WVCCPA, specifically W. Va. Code § 46A-7-104, authorizes the Attorney General to issue an investigative subpoena requiring production of documents from an out-of-state lender that has made loans to West Virginia residents and engaged in allegedly unlawful debt collection activities when the lender's records are located out of state?

5. Whether a circuit court in West Virginia has jurisdiction to enforce an investigative subpoena issued by the Attorney General pursuant to W. Va. Code § 46A-7-104 for the records of a lender that engaged in allegedly unlawful debt collection activities here when the company or its records are located out of state?

(Pet. at 1.)

Although the foregoing questions are repeated verbatim in compliance with Rule 16(g), Respondents move to strike or disregard Questions 1, 2, and 3 because (i) the Order below did

not decide those issues, and (ii) the Circuit Court of Kanawha County ("Circuit Court") did not certify those questions to this Court.

With regard to Questions 4 and 5, Respondents object to the extent that those questions have imbedded in them absolutely false assumptions which do not fairly present the ***sole issue*** decided by the Circuit Court's Order, i.e., whether the administrative subpoena *duces tecum* issued by Petitioner on or about March 2, 2011 ("Subpoena") was "procedurally sound." (Order ¶ 13 ("The sole issue presented in this proceeding concerns the fifth Hoover requirement, namely whether Petitioner employed proper procedures in issuing the Subpoena against Respondents.").[1] To the extent that Questions 4 and 5 seek somehow to determine the breadth of the attorney general's investigative authority, that question was never presented to the Circuit Court and is well beyond the scope of this proceeding. At no point in the proceedings did Respondents, or Judge King, take the position that the attorney general lacks substantive, investigative authority. Instead, the issue was simply whether Petitioner employed proper *procedures* in issuing his Subpoena. (*See* Order ¶ 20.)[2] This Court should strike and disregard all impertinent matters contained in Questions 1 through 5 that exceed the scope of the Order.

Respondents respectfully suggest that the issue presented, if any, is more properly framed as follows:

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[1] This Court has adopted five "tightly drawn" requirements an agency must meet to obtain judicial backing for the enforcement of its administrative subpoena. *See* Syl. Pt. 1, *Hoover v. Berger*, 199 W. Va. 12, 14, 483 S.E.2d 12, 14 (1997). Among other requirements, and at issue here, the agency bears the burden to prove that "proper procedures have been employed in issuing the subpoena." *Id.*

[2] On this point the Circuit Court clearly explained that "[t]he mere fact that Petitioner has investigatory powers pursuant to W. Va. Code § 46A-7-104, does not authorize Petitioner to use procedurally defective mechanisms for exercising those powers, or to attempt to circumvent the well-established procedures that apply to all parties seeking out-of-state discovery. To conclude otherwise would eviscerate the fifth factor of the Hoover test, which imposes as a separate and distinct requirement that the agency demonstrate that it employed proper *procedures* in issuing its subpoena. Hoover, 199 W. Va. at 14." (Order ¶ 20.)

1. Whether the Circuit Court exceeded its legitimate powers when it held that "because Petitioner did not carry its burden to demonstrate that he used proper procedures in issuing the Subpoena, the Subpoena is invalid and is not entitled to judicial backing or enforcement. See Syl. Pt. 1, Hoover, 199 W. Va. At 14."

(Order ¶ 22.) For all of the reasons discussed herein, the answer to this question is resoundingly "no." Simply no abuse of discretion or usurpation of power has occurred, as must be found for a writ of prohibition to issue.

STATEMENT OF FACTS

Petitioner misrepresents the record by including extraneous facts that were not decided by the Circuit Court and by omitting from the procedural history the time frame for appeal. For instance, Petitioner's brief discusses "payday loans" when the three consumer complaints on record only involved "title loans." (Pet. at 2-3.) Petitioner's brief also attaches exhibits that were not presented or admitted into the record during the proceeding below. To correct the inaccuracies and omissions in the Petition, Respondents present the factual findings actually made by the Circuit Court, based on the evidence presented, which were limited to the following:

1. On or about March 2, 2011, Petitioner issued an administrative subpoena *duces tecum*, in his capacity as Attorney General, and pursuant to West Virginia Code § 46A-7-104(1) (the "Subpoena").

2. The Subpoena was directed to Fast Auto Loans, Inc. ("Fast Auto") and Robert I. Reich, and served in Atlanta, Georgia. Respondent Community Loans of America, Inc. was not the subject of the Subpoena, nor did Petitioner serve it with a separate subpoena, prior to instituting this enforcement action.

3. The Subpoena was not domesticated in Georgia, and did not issue from the Clerk of the Fulton County Superior Court, located in Atlanta, Georgia.

4. The Subpoena seeks to compel non-resident Respondents to produce documents located exclusively outside of West Virginia.

5. In response, Respondents objected to the validity of Petitioner's Subpoena, and produced the affidavit of Terry E. Fields, Chief Financial Officer of Fast Auto.

6. Fast Auto is a business entity organized under the laws of the Commonwealth of Virginia, with its principal place of business in the Commonwealth of Virginia.

7. Fast Auto is not registered to transact business in West Virginia, and does not have any offices or employees in West Virginia.

8. Petitioner presented three consumer complaints filed with the Attorney General's office alleging that Respondent Fast Auto made unlawful debt collection phone calls from Virginia into West Virginia, in violation of the West Virginia Consumer Protection Act. The complaints presented were the following: (i) a February 16, 2007 complaint submitted by Mabel Williams (now deceased), (ii) a March 16, 2009 complaint submitted by James E. Mack concerning a Fast Auto loan to his daughter, who resides in Manassas, VA, and (iii) a September 9, 2010 complaint submitted by Mildred Morris.

9. Respondents contend that the Subpoena is procedurally defective, and therefore, invalid. Respondents further contend that any proceeding to enforce or modify the Subpoena must be brought in the discovery state, i.e., Georgia, and in accordance with its laws.

(*See* Order ¶¶ 1-9.)

Petitioner also misstates the procedural history by omitting the time frame applicable for appeal. On August 15, 2011, Judge King entered the final Order denying the Petition to Enforce Investigative Subpoena and for Related Relief and dismissing the action from the active docket of the court. ***Petitioner did not timely file a notice of appeal within thirty days of entry of the***

judgment. Instead, ***nearly four months later***, on December 5, 2011, Petitioner filed the instant Petition for Writ of Prohibition, seeking the customary relief of an appeal: to overturn the August 15, 2011 final Order entered by Judge King. As discussed below, an appeal and a writ of prohibition are not identical devices, interchangeable at will.

SUMMARY OF ARGUMENT

The Petition presents five questions to this Court in an effort to "prohibit" (rather than appeal) a *final order* entered by Judge King.[3] This is Petitioner's second attempt to seek enforcement of a procedurally invalid subpoena, resorting again to expensive and unnecessary litigation while his remedy has all this time been in hand: following the well-established procedural rules for serving an out-of-state subpoena. Inexplicably, however, Petitioner persists in seeking judicial enforcement of a defective and invalid Subpoena. As discussed below, the Petition should be denied for at least three independently sufficient reasons.

First, Petitioner presents questions that vastly exceed the scope of the sole issue decided by Judge King's Order, i.e., whether Petitioner carried its burden to show that its administrative Subpoena was "procedurally sound" and entitled to judicial backing. All other issues, including minimum contact analysis or the general breadth of the attorney general's investigatory authority are irrelevant red-herrings and purely academic questions that are not properly before this Court on the writ, nor certified as questions for determination. Respondents respectfully request that all extraneous and impertinent issues be disregarded by this Court.

Second, the extraordinary writ of prohibition simply does not lie in this case. The matter is clear-cut: Petitioner blew the deadline to appeal the final Order entered by Judge King and is

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[3] This Court has clearly stated that "[p]rohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and ***may not be used as a substitute for [a petition for appeal]*** or certiorari." *Hoover v. Berger*, 199 W. Va. 12, 14, 483 S.E.2d 12, 14 (1997) (citing Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (brackets in original, emphasis added)).

now seeking to bypass the appellate rules by filing a writ of prohibition. The irony is that after failing to follow proper procedures to serve his Subpoena, Petitioner now brings a procedurally-defective appeal. In no uncertain terms, this Court has previously held that it "do[es] not look favorably upon the use of extraordinary writs to address problems which should have been appealed." *Evans v. Robinson*, 197 W. Va. 482, 489 n. 11, 475 S.E.2d 959, 965 n. 11 (1996). The finality of the Order afforded Petitioner an adequate and complete remedy for review by direct appeal. His failure to exercise his right by filing a timely appeal, within the 30-day period, does not entitle him to the extraordinary remedy of a writ nearly four months after the Order was entered. In these circumstances, if the Court were to entertain this petition for prohibition, it would effectively extend to Petitioner the privilege of an untimely appeal and possibly even provide a mechanism for future parties to bypass the proper appellate procedures. Surely, these irregular circumstances fall short of the "most serious and critical ills" for which the writ of prohibition's "strong medicine" is "sparingly employed" to remedy. *U.S. v. Boe*, 543 F.2d 151, 158 (1976).

Third, even if this Court considers an untimely appeal as a writ, all five factors considered in determining whether prohibition should issue strongly weigh against the discretionary grant of a writ in this case. *See* Syl. Pt. 1, *State ex rel. Weirton Med. Ctr. v. Mazzone*, 214 W. Va. 146, 587 S.E. 2d 122 (2002). The Petition thus fails on its merits:

1. *Petitioner has adequate means, such as direct appeal, to obtain the desired relief.* As with all final orders, the Rules of Appellate Procedure afforded Petitioner the right of direct appeal to obtain the desired relief. The fact that, in this case, Petitioner waived his right and failed to timely appeal the Order does not entitle him to the drastic remedy of prohibition. Even today, Petitioner has an alternative remedy in that he may, at any time, serve Respondents with a

procedurally sound subpoena. A writ of prohibition is thus wholly unnecessary in this case, and its issuance will likely only create bad precedent and waste scarce judicial resources.

2. Petitioner will not be damaged or prejudiced in a way that is not correctable on appeal. Petitioner cannot reasonably claim prejudice from his voluntary waiver of his right of direct appeal, which he allowed to expire. Typically, the extraordinary writ is employed only in emergency situations and is invoked *in advance* of a final determination, where an appeal after a final order would be inadequate. Here, the Petition is filed *after* the final determination, and even *after* the expiration of the appellate period. Any damage that Petitioner allegedly suffered was inflicted by his own hand. In any event, no "incurable damage" could possibly arise to Petitioner because he can issue another subpoena to Respondents at any time he wishes.

3. The Order is not clearly erroneous as a matter of law. Most importantly, issuance of a writ is improper because there is no clear-cut legal error to prohibit. The conclusions of law presented in the Order involved a straightforward application of the standards for judicial enforcement of an administrative subpoena, which requirements were articulated by this Court in *Hoover v. Berger.* In fact, the only legal issue decided by the Order was whether Petitioner carried his burden to show that proper procedures were employed in issuing the Subpoena. (Order ¶¶ 10-11.) The Circuit Court concluded that, based on the record, Petitioner did not demonstrate that his Subpoena was "procedurally sound," as required by the fifth *Hoover* prong, and therefore, held that Subpoena was invalid and not judicially enforceable, as required by *Hoover.* (Order ¶¶13-14.) Specifically, the Subpoena did not withstand scrutiny because the procedural requirements for domesticating an out-of-state subpoena *duces tecum* were not met. *Id.*

4. The Order is not an oft repeated error and does not manifest persistent disregard for either procedural or substantive law. It is Petitioner, not Judge King, who seeks to disregard well-established procedural law. The Circuit Court Order is merely a straightforward application of the *Hoover* standard for judicial enforcement of an administrative subpoena. To the extent that Petitioner seeks to attack the Order, it is only because the Order applies the law, not disregards it. Further, the accusation that somehow Judge King denied Petitioner his substantive investigatory power is directly contrary to the Order, which was expressly limited to procedural, not substantive, issues of law. Judge King and Respondents alike do not dispute that W. Va. Code § 46A-7-104 grants the attorney general investigative powers, but rather contend that — like everyone else — the attorney general has to use proper procedures in issuing his subpoenas. This entire proceeding (and the motion to compel filed below) is unnecessary because absolutely no one disputes that Petitioner has the power to investigate if done in accordance with law, including as here, the procedural requirements applicable to out-of-state subpoenas.

5. The Order does not raise new and important problems or issues of law of first impression. Although Petitioner may wish to create a novelty in the law that grants a procedural exception just for him, the reality is that noting in the Order presents a new or important legal problem or issue of first impression. Fairly considered, the issue presented to Judge King was a quotidian — even mundane — procedural issue. Multitudes of subpoenas are issued every day, and there is nothing remarkable or unfamiliar with the requirement that for *any* subpoena to be enforceable — and *Hoover* makes clear that an administrative subpoena is no exception — "proper procedures [must] have been employed in issuing the subpoena." Syl. Pt. 1, in part, *Hoover*, 199 W. Va. at 14. This is especially true of out-of-state subpoenas, which seek to

retrieve evidence and witnesses outside state borders. Accordingly, Respondents respectfully ask this Court to refuse the Petition because this is clearly not a case of usurpation or abuse of power.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents contend that no issue exists in this case to base a finding that the Circuit Court exceeded its legitimate powers and/or abused its discretion, and accordingly, the Petition should be denied. If, however, the Court grants the Petition, Respondents respectfully request the opportunity to present oral argument in accordance with Rule 20.

ARGUMENT

I. THE QUESTIONS PRESENTED BY PETITIONER ARE NOT PROPERLY BEFORE THIS COURT BECAUSE THE ORDER DID NOT DECIDE THOSE ISSUES, NOR DID THE CIRCUIT COURT CERTIFY THOSE QUESTIONS TO THIS COURT.

A. The Only Issue Decided by the Order Was Whether Petitioner Carried Its Burden to Show that Proper Procedures Were Employed in Issuing the Subpoena.

Petitioner's attempt to vastly expand the scope of the Order should be rejected. By the plain language of the Order, the "sole issue" presented in the circuit court proceeding concerned the fifth *Hoover* requirement, namely whether Petitioner employed proper procedures in issuing the Subpoena against Respondents. (Order ¶ 13.) Applying the standard this Court set forth for judicial enforcement of an administrative subpoena, the Circuit Court made, *inter alia,* the following Conclusions of Law:

> 13. The sole issue presented in this proceeding concerns the fifth Hoover requirement, namely whether Petitioner employed proper procedures in issuing the Subpoena against Respondents. Id. If Petitioner cannot demonstrate that the Subpoena is "procedurally sound," the Subpoena is invalid and cannot be enforced. Id.
>
> 14. In this case, the Subpoena cannot withstand scrutiny because the procedural requirements for issuing a valid out-of-state subpoena *duces tecum* were not met.

(Order ¶¶ 13-14.)

Based on the record presented, the Circuit Court concluded that the procedural requirements for issuing an out-of-state subpoena were not met:

> 17. The evidence on record indicates that Petitioner failed to perform the procedural requirements necessary to issue a valid out-of-state subpoena. Petitioner did not domesticate his subpoena in Georgia. He did not obtain a Commission from this Court. He did not request that an equivalent subpoena be issued by the Clerk of the court in the county where Respondents reside, and indeed, it was not issued by the Clerk of the Fulton County Superior Court.
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> 18. Petitioner, who bears the burden in the first instance, has not produced any authority to support his unilateral issuance of a West Virginia administrative subpoena *duces tecum* in Georgia, and this Court is not otherwise aware of any authority permitting Petitioner to circumvent the procedural rules applicable to all parties issuing out-of-state subpoenas.

(Order ¶¶ 17-18.)

Finally, based on the entire record, the Circuit Court concluded that:

> 22. Accordingly, because Petitioner cannot carry its burden to demonstrate that he used proper procedures in issuing the Subpoena, the Subpoena is invalid and is not entitled to judicial backing or enforcement. See Syl. Pt. 1, Hoover, 199 W.Va. at 14.

(Order ¶ 22.) Furthermore, as Petitioner concedes in his brief, the Circuit Court "did not make any ruling from the bench at the hearing," and hence, to the extent that this Court seeks to review the ruling below, that ruling is contained only in the written Order. (Pet. at 4.) Petitioner's newly-injected legal arguments — like his extraneous facts — are not part of the record and have no bearing on this writ.

B. Petitioner's Questions Should Be Struck or Disregarded Because Even if a Writ of Prohibition Issues, It Cannot Prohibit Acts that Exceed the Scope of the Order.

As the referenced portions of the written Order conclusively demonstrate, the questions presented by Petitioner are completely irrelevant to this writ. There is no indication in the Order that those issues were decided in the underlying proceeding. It is a paramount principle of jurisprudence that a court speaks only through its orders. *Legg v. Felinton*, 219 W. Va. 478, 483, 637 S.E.2d 576, 581 (2006); *State v. White*, 188 W. Va. 534, 536 n.2, 425 S.E.2d 210, 212 n.2 (1992) ("[H]aving held that a court speaks through its orders, we are left to decide this case within the parameters of the circuit court's order.") (citations omitted). This Court has adhered to this principle when presented with conflicting signals in the record, and has consistently held that the Court "will not address, for the first time on appeal, a matter that has not been considered by the circuit court." *See* Syl. Pt. 2, *Trent v. Cook*, 198 W. Va. 601, 482 S.E.2d 218 (1996) ("[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below"); Syl. Pt. 4, *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W. Va. 93, 199 S.E.2d 308 (1973) ("This Court will not consider questions, nonjurisdictional in nature, which have not been acted upon by the trial court.") Accordingly, this Court's appellate review should be limited to the findings and conclusions actually rendered by the Circuit Court.

As discussed above, Respondents respectfully move this Court to strike and disregard Questions 1, 2, and 3, which ask whether sufficient minimum contacts exist to satisfy due process, because the Order did not decide that issue, nor did the Circuit Court certify those questions to this Court. (Pet. at 1.) With regard to Questions 4 and 5, Respondents object to the extent that those questions are either irrelevant or have imbedded in them absolutely false

assumptions. Question 4 seeks to determine the breadth of the attorney general's investigative authority, a question that was never presented to the Circuit Court and is well beyond the scope of this proceeding. At no point in the proceedings did Respondents, or Judge King, take the position that the attorney general lacks substantive, investigative authority. Instead, the issue was simply whether Petitioner employed proper *procedures* in issuing its Subpoena. (*See* Order ¶ 20.). It is unclear whether Question 5 asks for a determination of the Circuit Court's subject matter jurisdiction or personal jurisdiction over the non-resident entity. Either way, Petitioner's inquiry contains the false assumption that the administrative subpoena was properly issued pursuant to the statute.

None of these questions fairly present the ***sole issue*** decided by the circuit court Order, i.e., whether the Subpoena issued was "procedurally sound." (Order ¶ 13 ("The sole issue presented in this proceeding concerns the fifth Hoover requirement, namely whether Petitioner employed proper procedures in issuing the Subpoena against Respondents."). This Court should strike and disregard all impertinent matters contained in Questions 1 through 5 that exceed the scope and parameters of the Order below.

II. THE EXTRAORDINARY WRIT OF PROHIBITION SIMPLY DOES NOT LIE IN THIS CASE.

A. Petitioner Missed Its Deadline to Appeal and Is Now Seeking to Bypass the Appellate Rules by Filing a Writ of Prohibition.

Petitioner blatantly attempts to circumvent normal appellate procedures because he neglected to timely file an appeal. In no uncertain terms, this Court has previously held that it "do[es] not look favorably upon the use of extraordinary writs to address problems which should have been appealed." *Evans v. Robinson*, 197 W. Va. 482, 489 n. 11, 475 S.E.2d 959, 865 n.11 (1996) (citing Syl. Pt. 1, *State ex rel. Williams v. Narick*, 164 W. Va. 632, 264 S.E.2d 851

(1980). *Cf. Hustead v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996) (A party could not bring a declaratory judgment action to challenge an order which memorialized a settlement because the more appropriate action when a party objects to the terms of the settlement that is approved by the circuit court is to appeal the order).

By its nature, a writ of prohibition is an "extraordinary" and "drastic" remedy that is reserved for only the most exceptional cases where there is no other adequate remedy. It cannot be allowed to usurp the function of an appeal. The United States Supreme Court described the extraordinary nature of the writ as follows: "Though the power is curative, it is strong medicine and its use must therefore be restricted to the most serious and critical ills. Use of the power is thus not unfettered. On the contrary, its reparative function is to be sparingly employed." *U.S. v. Boe*, 543 F.2d 151, 158 (1976). The decisions by this Court are in accord. *E.g., Williams*, 164 W. Va. at 635, 264 S.E.2d at 854 ("Traditionally, the writ of prohibition was not designed to correct errors which are correctable upon appeal."). Indeed, this Court has specifically stated that "the writ does not lie to correct 'mere errors' and that it cannot serve as a substitute for appeal, writ of error or certiorari." *Narick*, 164 W. Va. at 635, 264 S.E.2d at 854; *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

West Virginia law squarely addresses the procedural issues presented in this case. It is a basic tenant that relief from a final order is obtained in the ordinary course of the appellate process, and in accordance with the appellate rules. *See Durm v. Heck's, Inc.*, 184 W. Va. 562, 566, 401 S.E.2d 908, 912 (1991) ("Generally, an order qualifies as a final order when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"). Rule 5 of the revised Rules of Appellate Procedure afforded Petitioner an adequate and complete remedy for review of the Order denying enforcement of his Subpoena. W. Va. R. Appellate P.

5(a) (2010) ("This rule governs all appeals from a circuit court final judgment or other appealable order in a civil or criminal case . . . ."). Subsection (b), governing the procedure for docketing an appeal, prescribes the procedure for appeal: "[w]ithin thirty days of entry of the judgment being appealed, the party appealing shall file the notice of appeal and the attachments required . . . in the Office of the Clerk of the Supreme Court." W. Va. R. Appellate P. 5(b) (2010). The expiration of the appellate period thus extinguishes the party's right to seek appellate relief, absent an extension of time granted by this Court.

Here, it is readily apparent that the Order was a final order, the correction of which was in the ordinary course of the appellate process. *See Durm*, 184 W. Va. at 566, 401 at 912. On August 15, 2011, Judge King entered the Order resolving all matters pending before the circuit court, and ordering that the matter be striken from his active docket. (Order at 6.) The finality of the Order thus afforded Petitioner an adequate and complete remedy for review by direct appeal. Pursuant to Appellate Rule 5, Petitioner was required to notice his appeal within 30 days of the August 15, 2011 Order. Petitioner, however, failed to file an appeal within the prescribed period of thirty days, and in fact, only filed the instant writ of prohibition nearly four months later on December 5, 2011. Accordingly, to the extent that Petitioner lacks an appellate remedy, it is only because he delayed commencement of this proceeding beyond the time reasonably necessary to protect his right.

In these circumstances, if the Court were to entertain this petition for prohibition, it would effectively extend to Petitioner the privilege of an untimely appeal and possibly even provide a mechanism for future parties to bypass the proper appellate procedures. The mere fact that Petitioner has blown his right to an appeal does not entitle him to the drastic remedy of a writ of prohibition against Judge King. *State ex rel. Tucker Co. Solid Waste Auth. v. West*

Virginia Div. of Labor, 668 S.E.2d 217 (holding that prohibition against judges is a drastic and extraordinary remedy, and as such, it is reserved for really extraordinary causes). Nor is the remedy rendered inadequate by the fact that an appeal has become inefficacious through Petitioner's own neglect. Simply put, Petitioner allowed the appeal period to expire and waived his right to an appeal. West Virginia law does not permit the writ of prohibition to usurp the function of an appeal, and thus, the Petition should be denied. *See Hinkle v. Black*, 262 S.E.2d 744 (W. Va. 1979) (holding that whenever the appellate court believes that prohibition is interposed for the purpose of delay or to confuse and confound legitimate workings of criminal or civil process in the lower courts, a rule will be denied).

B. Even if this Court Considers an Untimely Appeal as a Writ, None of the Factors, Fairly Considered, Support the Issuance of a Writ in this Case.

1. Legal Standard.

This Court has set forth the standard for determining whether to entertain and issue a writ of prohibition when a trial court is alleged to have exceeded its legitimate powers. *See State ex rel. Weirton Med. Ctr. v. Mazzone*, Syllabus Pt. 1, 214 W. Va. 146, 587 S.E. 2d 122 (2002). The following five factors shall be considered:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
>
> (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
>
> (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
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> (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
>
> (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Id. at Syllabus Pt. 2. While these factors are considered "general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition" should be issued, the third factor, "the existence of clear error," should be given "substantial weight." *State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 517, 575 S.E.2d 124, 127 (2002). Thus, a writ of prohibition should not issue if there is no "clear-cut error that needs resolution." *See State ex rel. United States Fidelity & Guar. Co. v.* Canady, 194 W. Va. 431, 437, 460 S.E.2d 677, 683 (1995). Furthermore, the "preventative purpose" of a writ of prohibition is best served in cases "where there is a high probability that the trial will be completely reversed if the error is not corrected ***in advance***." *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 365, 508 S.E.2d 75, 82 (1998) (emphasis added).

2. Petitioner Is Incorrect that the Five-factor Test for Issuance of a Writ Is Met in this Case.

Nothing about this case falls within the ambit of prohibition. As reflected in the record, Petitioner has had — and continues to have at his disposal — adequate alternative remedies for the relief he seeks; no substantial, clear-cut legal error plainly in contravention of clear statutory, constitutional or common-law mandate occurred; and here, there is no "preventative function" to be served which arises when prohibition is sought *in advance* of a final determination. *Ellis v. King*, 400 S.E.2d 235 (W. Va. 1990). Instead, the record reflects that the Circuit Court applied routine procedural rules and properly exercised its discretion in holding that Petitioner did not carry his burden to show that his Subpoena was procedurally sound, as required by *Hoover.* As discussed below, each of the factors weighs heavily in favor of denying the petition for writ of prohibition in this case:

(1) Petitioner has other adequate means to obtain the desired relief.

The first factor for consideration is whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief. *State ex rel. Gordon Mem'l*

Hosp. v. West Virginia State Bd. of Examiners for Registered Nurses, 66 S.E.2d 1 (W. Va. 1951) (holding that prohibition is an extraordinary remedy for use only in cases of necessity, and should be invoked only when relief sought is not available through ordinary channels). Clearly, on the record presented, Petitioner had ample opportunity for the relief he seeks. As with all final orders, the Rules of Appellate Procedure afforded Petitioner the right of direct appeal. The fact that, in this case, Petitioner waived his right and failed to timely appeal the Order does not entitle him to the drastic remedy of prohibition. Even today, Petitioner has an alternative remedy in that he may, at any time he wishes, serve Respondents with a procedurally sound subpoena. A writ of prohibition is wholly unnecessary in this case and is a waste of judicial resources. Accordingly, the first factor weighs decidedly against the issuance of a writ in this case.

(2) Petitioner will not be damaged or prejudiced in a way that is not correctable on appeal;

For similar reasons, the second factor, i.e., whether Petitioner will be damaged or prejudiced in a way that is not correctable on appeal, is easily disposed of. Petitioner cannot reasonably claim prejudice from his *voluntary* waiver of his right of direct appeal, which he allowed to expire. Typically, the extraordinary writ is employed only in emergency situations and is invoked *in advance* of a final determination, where an appeal after a final order would be inadequate. Here, the Petition is filed *after* the final determination, and even *after* the expiration of the appellate period. Any damage that Petitioner allegedly suffered was inflicted by his own hand. In any event, no "incurable damage" could possibly arise to Petitioner because he can issue another subpoena to Respondents at any time he wishes. Accordingly, the second factor also clearly militates against the issuance of a writ.

(3) *Whether the lower tribunal's order is clearly erroneous as a matter of law;*

With regard to the third factor, the absence of any "clear cut" legal error is fatal to Petitioner's application. *See* Syl. Pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). When this Court examines a circuit court's order, "[t]he general rule is that there is a presumption of regularity of court proceedings; it remains until the contrary appears and the burden is on the person who alleges such irregularity to affirmatively show it." Syl. Pt. 1, *Evans v. Robinson*, 197 W. Va. 482, 483, 475 S.E.2d 858, 859 (1996). This general principle "is particularly true when a party, who has failed to appeal a final order, brings an extraordinary writ to challenge that final order, given that on appeal . . .

> [a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.

Id. (citing Syl. Pt. 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966). Here, Petitioner cannot show a "clear cut legal error" in the Circuit Court's limited finding that Petitioner failed to carry his burden to demonstrate that he used proper procedures in issuing the Subpoena.

Under West Virginia law, Petitioner's administrative subpoena is not entitled to judicial backing unless, among other factors, it was procedurally sound. An administrative subpoena *duces tecum* is not self-executing, but is a direction to produce documents subject to judicial review and enforcement. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 195 (1946); *Hoover v. Berger*, 199 W. Va. 12, 17, 483 S.E.2d 12, 17 (1996). West Virginia law thus recognizes that "the subject or target of an administrative subpoena *duces tecum* has an opportunity to challenge the subpoena before yielding that information." See W. Va. Code § 29A-5-1(b); *Hoover*, 199 W. Va. at 17; *Ebbert v. Bouchelle*, 123 W. Va. 265, 268, 14 S.E.2d

614, 616 (1941) ("it is perfectly clear that the question of complying with its (a subpoena *duces tecum*) commands, if not the resistance of its issuance, may properly be raised in a preliminary procedure"). Privileges, privacy rights, and the unreasonableness of an administrative subpoena are all "available defenses against enforcement of the subpoena." *Hoover*, 199 W. Va. at 17 (quoting *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984)).

This Court has articulated that, in order to obtain judicial backing for its administrative subpoena, the agency must prove five "tightly drawn" requirements, including that (1) the subpoena is issued for a legislatively authorized purpose, (2) the information sought is relevant to the authorized purpose, (3) the information sought is not already within the agency's possession, (4) the information sought is adequately described, and (5) proper procedures have been employed in issuing the subpoena." Syl. Pt. 1, in part, *Hoover*, 199 W. Va. at 14; *see also West Virginia Human Rights Comm'n v. Moore*, 186 W. Va. 183, 187, 411 S.E.2d 702, 706 (1991) (adopting the federal standards to determine the enforceability of a subpoena). It is only when each of these concerns is satisfied that the subpoena is presumptively valid, and the burden shifts to those opposing the subpoena. *Hoover*, 199 W. Va. at 14, 17. As evident from the record, Petitioner utterly failed to meet the procedural requirements in issuing his subpoena, and as a result, the Subpoena was not entitled to presumptive validity or judicial backing for enforcement.

There are a number of mechanisms available to Petitioner to issue a valid out-of-state subpoena, none of which have been complied with here. The general principles of territorial jurisdiction and state sovereignty dictate that a forum state's subpoena power generally does not extend beyond its borders. *Guthrie v. Am. Broad. Companies, Inc.*, 733 F.2d 634, 639 (4th Cir. 1984); *see also Ealy v. State*, 306 S.E.2d 275 (Ga. 1983) (recognizing that "[a]s to out-of-state witnesses [the] court's subpoena power is inapplicable"). While most states have allowed for

cooperation in compelling discovery across state lines, the procedure adopted by the foreign state and county as to methods of issuing a subpoena *duces tecum* for an out-of-state case must be specifically complied with. To be sure, these procedural requirements are not mere formalities. Substantial state sovereignty interests are at issue, as are the due process rights of individuals who are the target of out-of-state subpoenas. In fairness to the subject of the subpoena, issuance and service of the subpoena shall be accomplished in accordance with the foreign state's procedures, and any motion brought to enforce, quash, or modify the subpoena, or for protective orders, must also be brought in the discovery state and pursuant to its laws. *Guthrie*, 733 F.2d at 639 (holding that, when discovery is sought from a witness resident in another state and outside the reach of process of the forum court, it is "necessary to have recourse to the [local] court of the witness's residence for the issuance ***and*** enforcement of a subpoena") (emphasis added); *see also* Ga. Code Ann. § 24-10-22.

For issuance of the out-of-state subpoena against a Georgia resident, the Clerk of the Superior Court in the county where the witness resides must issue the subpoena. Ga. Code Ann. §§ 24-10-20(a)-(b) ("Every subpoena shall be issued by the clerk under the seal of the court . . . . The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence signed and sealed . . . ."). To do so, the Clerk requires a written Commission from the foreign court, providing the pertinent information and requesting that the Clerk issue the subpoena in accordance with local law. Once an Order of Commission is granted by the Georgia court, and fees are paid, the Clerk can effect service of the subpoena in accordance with Georgia procedure. A requesting party, like Petitioner, simply does not have an absolute or automatic right to obtain or compel out-of-state evidence. *See, e.g., French v. State*, 655 S.E.2d 224, 227 (Ga. App. 2007) (observing procedure whereby, upon proper presentation of facts, a court in the demanding state

issues a certificate requesting the issuance of a subpoena *duces tecum* from a foreign state). Certainly, Respondents are aware of no authority permitting a party to do so unilaterally, as Petitioner has done in this instance.

It is undisputed in the record that Petitioner failed to perform virtually *any* of the procedural requirements necessary to issue a valid out-of-state subpoena. The Circuit Court's Order clearly reflects the fact that Petitioner failed to carry his burden with respect to the fifth *Hoover* factor. While Petitioner may desire to circumvent the foreign court's procedures, he — like everyone else — is required to follow the rules. In this case, the procedural rules of Georgia, the state where Respondents reside, govern the issuance and service of the subpoena. Contrary to the procedures outlined above, however, Petitioner made no attempt to domesticate the subpoena in Georgia. Petitioner prepared and issued the subpoena himself. He did not obtain a Commission from this Court. He did not request that an equivalent subpoena be issued by the Clerk of the court in the county where Respondents reside, and indeed, it was not issued by the Clerk of the Fulton County Superior Court. Having failed to do so, the Circuit Court correctly found that Petitioner's Subpoena was invalid and not entitled to judicial backing or enforcement. *See* Syl. Pt. 1, *Hoover*, 199 W. Va. at 14. Accordingly, in a case like this, the absence of clear legal error is dispositive of the issuance of a writ of prohibition.

(4) Whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law;

The inapplicability of the fourth factor also supports denial of the writ in this case. The Circuit Court's Order is a straightforward application of the well-established standard, articulated in *Hoover*, for judicial enforcement of an administrative subpoena. As reflected in the record, the only issue presented was procedural in nature; substantive law was not at issue. The suggestion

that somehow Judge King denied Petitioner his substantive investigatory power is directly contrary to the Order. Judge King and Respondents alike do not dispute that W. Va. Code § 46A-7-104 grants the attorney general investigative powers, but rather contend that — like everyone else — the attorney general has to use proper procedures in issuing his subpoenas.

(5) Whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Although Petitioner may wish to create a novelty in the law that grants a procedural exception just for him, the reality is that noting in the Order presents a new or important legal problems or issues of first impression. Fairly considered, the issue presented to Judge King was a quotidian procedural issue. Multitudes of subpoenas are issued every day, and there is nothing remarkable or unfamiliar with the requirement that for *any* subpoena to be enforceable — and an administrative subpoena is no exception — "proper procedures [must] have been employed in issuing the subpoena." Syl. Pt. 1, in part, *Hoover*, 199 W. Va. at 14. This is especially true of out-of-state subpoenas, which seek to retrieve evidence and witnesses outside the state. Accordingly, Respondents respectfully ask this Court to refuse the Petition because this is clearly not a case of usurpation or abuse of power. Prohibition does not lie in this case.

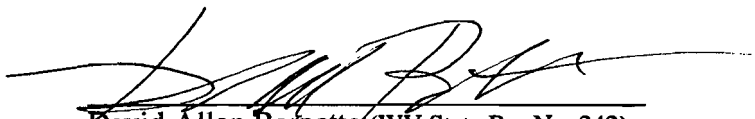
CONCLUSION

For all the foregoing reasons, and based upon the record, Respondents respectfully request that this Court deny the Petition for Writ of Prohibition in its entirety.

Respectfully submitted,

FAST AUTO LOANS, INC., COMMUNITY LOANS OF AMERICA, INC. and ROBERT I. REICH

By Counsel



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Counsel for Respondents

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

ON A PETITION FOR A WRIT OF PROHIBITION
FROM AN ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY
CIVIL ACTION NO. 11-MISC-206

STATE OF WEST VIRGINIA, ex rel.
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL,

Petitioner,

v. **Prohibition No. 11-1644**

THE HONORABLE CHARLES E. KING, JR., JUDGE, Circuit Court of Kanawha County; FAST AUTO LOANS, INC., a Virginia Corporation; COMMUNITY LOANS OF AMERICA, INC., a Georgia Corporation; and ROBERT I. REICH, President and Chief Executive Officer of Fast Auto Loans, Inc. and Community Loans of America, Inc.,

Respondents.

CERTIFICATE OF SERVICE

I, David Allen Barnette, counsel for Respondents, Fast Auto Loans, Inc., Community Loans of America, Inc., and Robert I. Reich, hereby certify that on this 4th day of January, 2012, I served via First Class Mail a true and exact copy of the foregoing ***Response to Petition for Writ of Prohibition*** to Petitioner and parties of record at the following addresses:

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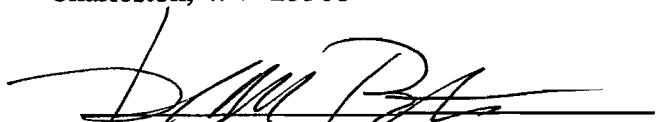
P.O. Box 1789
Charleston, WV 25326-1789

Honorable Charles E. King, Judge
Circuit Court of Kanawha County
111 Court Street
Charleston, WV 25301



David Allen Barnette (WV State Bar No. 242)

EXHIBITS

ON

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